

TROUTMAN SANDERS LLP
Jessica R. Lohr (Cal. Bar No. 302348)
jessica.lohr@troutman.com
5 Park Plaza, Suite 1400
Irvine, CA 92614
Telephone: 858-509-6000
Facsimile: 858-509-6040

John C. Lynch (*admitted pro hac vice*)
john.lynch@troutman.com
Virginia Bell Flynn (*admitted pro hac vice*)
virginia.flynn@troutman.com
222 Central Park Avenue, Suite 2000
Virginia, Beach, VA 23462
Telephone: 757-687-7765
Facsimile: 757-687-7510

**Attorneys for Defendant
OCWEN LOAN SERVICING, LLC**

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

Richard Quinones,

Plaintiff,

V.

Ocwen Loan Servicing, LLC,

Defendant.

Case No. 2:17-CV-03526-DDP-FFM

**DEFENDANT'S MOTION IN
LIMINE TO EXCLUDE REPORT
AND TESTIMONY OF PLAINTIFF'S
EXPERT HANSEN**

Pretrial Conf.: October 22, 2018
Hearing Date: October 22, 2018
Hearing Time: 11:00 a.m.

Judge: Dean D. Pregerson
Dept: 9C

Trial Date: October 31, 2018

TABLE OF CONTENTS

	Page
I. ARGUMENT	1
A. Legal Authority	1
1. Mr. Hansen's Opinions Are Irrelevant Based on ACA and Should be Excluded	3
2. Mr. Hansen's Legal Conclusions Should Be Excluded	7
B. Terms of Order Sought	10
II. CONCLUSION	10

1
2 **TABLE OF AUTHORITIES**
3

	Cases	Page
1		
2		
3	<i>ACA International v. FCC</i> , 885 F.3d 687 (D.C. Cir. 2018)	<i>passim</i>
4		
5	<i>Arjangrad v. JPMorgan Chase Bank, N.A.</i> , No. 10-CV-01157, 2012 WL 1890372 (D. Or. May 23, 2012)	8
6		
7	<i>Dominguez v. Yahoo</i> , 894 F.3d 116 (3d Cir. June 26, 2018).....	3, 4
8		
9	<i>Dominguez v. Yahoo, Inc.</i> , 2018 U.S. App. LEXIS 17436 (3d Cir. June 26, 2018)	2, 3, 4, 5
10		
11	<i>Gragg v. Orange Cab Co., Inc.</i> , 995 F. Supp. 2d 1189 (W.D. Wash. 2014)	3
12		
13	<i>Keyes v. Ocwen Loan Servicing</i> , No. 1:17-cv-11492 (E.D. Mich. Aug. 16, 2018)	<i>passim</i>
14		
15	<i>Legg v. Voice Media Group, Inc.</i> , 2014 U.S. Dist. LEXIS 61322 (S.D. Fla. May 2, 2014)	9, 10
16		
17	<i>Marks v. Crunch San Diego, LLC</i> , No. 14-56834, 2018 U.S. App. LEXIS 26883 (9th Cir. Sep. 20, 2018).....	1, 4, 5, 6
18		
19	<i>Marshall v. CBE Grp., Inc.</i> , No. 16-CV-02406, 2018 U.S. Dist. LEXIS 55223 (D. Nev. Mar. 30, 2018)	4
20		
21	<i>McMillon v. Rash Curtis & Assocs.</i> , 2018 U.S. Dist. LEXIS 101700 (N.D. Cal. June 18, 2018)	5
22		
23	<i>Nationwide Transp. Fin. v. Cass Info. Sys., Inc.</i> , 523 F.3d 1051 (9th Cir. 2008).....	7, 8
24		
25	<i>Reyes v. BCA Financial Services, Inc.</i> , 2018 U.S. Dist. LEXIS 80690 (S.D. Fla. May 14, 2018)	6
26		
27	<i>Strauss v. CBE Grp., Inc.</i> , 2016 U.S. Dist. LEXIS 65587 (S.D. Fla. March 23, 2016)	2, 8, 9, 10
28		

1
2 **TABLE OF AUTHORITIES**
3 (b*continued*)

	Page
Cases	
<i>United States v. Boulware</i> , 558 F.3d 971 (9th Cir. 2009).....	8
<i>Washington v. Six Continents Hotels, Inc.</i> , No. 2:16-CV-03719-ODW-JEM, 2018 U.S. Dist. LEXIS 145639 (C.D. Cal. Aug. 24, 2018)	5, 6
Statutes	
47 U.S.C. § 227.....	1, 7, 9
Other Authorities	
Rule 702.....	8

1 Defendant Ocwen Loan Servicing, LLC (“Ocwen”), by counsel, respectfully
 2 moves the Court in limine for entry of an Order prohibiting any mention of or
 3 reference to, by any party herein, in opening statements, in the questioning of
 4 witnesses and expert witnesses, in documentary evidence and exhibits, in closing
 5 arguments or in any other manner before the jury, evidence regarding Plaintiff’s
 6 purported expert Jeffrey Hansen.

7 **I. ARGUMENT**

8 **A. Legal Authority**

9 Ocwen seeks to exclude the testimony of Plaintiff’s purported expert, Jeffrey
 10 Hansen, in support of her claim that Ocwen used an automatic telephone dialing
 11 system (“ATDS”) to call her in violation of the Telephone Consumer Protection
 12 Act (“TCPA”). Mr. Hansen’s opinions should be excluded because they are
 13 unreliable, irrelevant, and constitute inadmissible legal conclusions. In fact, the
 14 exact same opinions of Mr. Hansen’s were just excluded a few weeks ago in *Keyes*
 15 v. *Ocwen Loan Servicing*, No. 1:17-cv-11492 (E.D. Mich. Aug. 16, 2018)
 16 (excluding identical expert opinions on Ocwen’s Aspect system because they were
 17 impermissible legal conclusions and were unreliable).

18 Mr. Hansen’s opinion that Ocwen’s Aspect system is a “predictive dialer” is
 19 inadmissible because the D.C. Circuit’s seminal decision in *ACA International v. FCC*,¹
 20 renders Mr. Hansen’s opinion irrelevant. Under ACA, a telephone system is
 21 an ATDS only if it falls within the statutory definition of an ATDS set forth in the
 22 TCPA.² Mr. Hansen freely admits that Ocwen does not use the Aspect system to
 23 generate random or sequential numbers, much less dial them. Moreover, according
 24 to Mr. Hansen, the Aspect system cannot generate random or sequential numbers
 25

26 ¹ 885 F.3d 687 (D.C. Cir. 2018).

27 ² See 47 U.S.C. § 227(a)(1); *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 U.S. App. LEXIS 26883, at *27
 28 (9th Cir. Sep. 20, 2018) (“[W]e read § 227(a)(1) to provide that the term “automatic telephone dialing system” means
 equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a
 random or sequential number generator—and to dial such numbers automatically (even if the system must be turned
 on or triggered by a person).”).

unless the user adds a command to Aspect's operating system. However, as found in *Keyes* and other cases, Ocwen cannot add such a command to the Aspect system because it does not have access to that code. Further, as averred in Ocwen's Motion for Summary Judgment, the Aspect system does not store the phone numbers Ocwen representatives dial through it; instead, phone numbers are stored in the RealServicing software system which also determines the numbers subject to the relevant call campaign and generates said call campaign lists. *See Declaration of Crystal Kearse ("Kearse Decl."), Dkt No. 74-5, at ¶¶ 14-15; Declaration of Aaron Woolfson ("Woolfson Decl."), Dkt. No. 74-6 at ¶¶ 66, 71.* Therefore, Hansen's opinions are irrelevant to whether the Aspect system has the ***present capacity*** to generate random or sequential numbers, which is the determinative question after *ACA*. This is exactly why the Third Circuit Court of Appeals recently affirmed the exclusion of the same opinions of Mr. Hansen that he seeks to offer in this case.³

Additionally, Mr. Hansen seeks to offer inadmissible legal conclusions. There is no question that an opinion that the Aspect system is an ATDS would be an impermissible legal conclusion.⁴ Mr. Hansen unsuccessfully tries to avoid this predicament by claiming in his report that the Aspect system "has the characteristics of automatic telephone dialing systems as defined by TCPA and FCC." There is no meaningful difference between this opinion and one explicitly stating that the Aspect system satisfies the requirements of an ATDS. This is especially true given that Hansen still contends that all predictive dialers are ATDSs with no regard for whether the system has the actual capacity to generate random or sequential numbers and then dial those numbers. This is no longer the

³ *See Dominguez v. Yahoo, Inc.*, 2018 U.S. App. LEXIS 17436 (3d Cir. June 26, 2018). For these same reasons, Ocwen will move in limine to exclude any argument or evidence that its Aspect system is a predictive dialer.

⁴ *See Keyes v. Ocwen Loan Servicing*, No. 1:17-cv-11492 (E.D. Mich. Aug. 16, 2018) (excluding identical expert report on Ocwen's Aspect system because it consisted of impermissible legal conclusions and also was formulated on unreliable methodology); *Strauss v. CBE Grp., Inc.*, 2016 U.S. Dist. LEXIS 65587, *6 (S.D. Fla. March 23, 2016) (excluding Hansen's opinions that the dialer system at issue "satisfies the requirements of an [ATDS]" as impermissible legal conclusions).

1 law based on ACA. Mr. Hansen's opinions are nothing more than poorly disguised
 2 legal conclusions, which should be excluded from trial.

3 **1. Mr. Hansen's Opinions Are Irrelevant Based on ACA and**
 4 **Should be Excluded.**

5 Mr. Hansen's opinions have been rendered irrelevant by the ACA decision.
 6 In ACA, the D.C. Circuit found that the FCC impermissibly broadened the
 7 definition of an ATDS beyond the statutory language in two important ways: (1)
 8 the FCC unreasonably interpreted the term "capacity" to include *all* of a device's
 9 ***potential*** functionalities, and (2) the FCC failed to adhere to the statute's
 10 requirement that the equipment in question must have the capacity to generate and
 11 dial random or sequential numbers.⁵ *See ACA*, 885 F.3d at 698. Specifically, "the
 12 D.C. Circuit took issue with the fact that 'a straightforward reading of the [FCC's]
 13 ruling invites the conclusion that all smartphones are autodialers.' This was so
 14 because, as the FCC had conceded, any ordinary smartphone could achieve
 15 autodialer functionality by simply downloading a random-number-generating app."
 16 *Dominguez v. Yahoo*, 894 F.3d 116, 119 (3d Cir. June 26, 2018). Under ACA, the
 17 statutory language determines whether telephone equipment constitutes an ATDS.

18 The impact of ACA on Hansen's opinions is explained by the Third Circuit
 19 Court of Appeals in *Dominguez v. Yahoo*. In *Yahoo*, the court explained that the
 20 "D.C. Circuit held that the FCC had exceeded its authority by interpreting the term
 21 'capacity' to include any *latent* or ***potential*** capacity and described the FCC's
 22 approach as 'utterly unreasonable in the breadth of its regulatory [in]clusion.'" *Id.*
 23 (quoting ACA, 885 F.3d at 697) (emphasis added). Based on ACA, the Third
 24 Circuit held that the plaintiff could "no longer rely on his argument that the Email
 25 SMS Service had the latent or potential capacity to function as autodialer. The only
 26 remaining question, then, is whether Dominguez provided evidence to show that

27
 28 ⁵ "'Random number generation' means random sequences of 10 digits, and 'sequential number generation' means
 (for example) (111) 111-1111, (111) 111-1112, and so on." *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189,
 1193 (W.D. Wash. 2014).

1 the Email SMS Service had the *present capacity* to function as autodialer.” *Id.*
 2 (emphasis added).⁶

3 Dominguez offered the reports of four experts, including Mr. Hansen, to
 4 prove that Yahoo used an ATDS to message him. The Third Circuit affirmed the
 5 exclusion of all of the reports, finding that none of them “help[ed] resolve the
 6 present capacity question.” *Id.* Regarding Mr. Hansen’s opinions, the court stated
 7 that Mr. Hansen “[did] not use the term ‘latent capacity’ but present[ed] similar
 8 analysis” by “propos[ing] six computer code commands, which, Hansen asserts,
 9 could be written into Yahoo’s operating system in order to generate wireless
 10 numbers randomly or sequentially.” *Id.* The court found that “the addition of a
 11 short sequence of code to *any computer operating system* bears a striking similarity
 12 to the downloading of an app onto *any smartphone*—the modification that was at
 13 issue in *ACA International*.” *Id.* at 120 n.23 (emphasis in original). As a result, the
 14 court ruled that Mr. Hansen’s report was “founded upon the exact type of
 15 hypothesizing that is foreclosed by *ACA International*. The District Court was
 16 therefore correct to exclude the Krishnamurthy, Christensen, and Hansen Reports,
 17 as *they are irrelevant to the present capacity inquiry*.” *Id.* at *7 (emphasis added).
 18 See also *Marshall v. CBE Grp., Inc.*, No. 16-CV-02406, 2018 U.S. Dist. LEXIS
 19 55223, at *17 (D. Nev. Mar. 30, 2018) (following *ACA* and refusing to consider
 20 expert testimony based on FCC’s interpretation that an ATDS could include
 21 technology that dials from “a fixed set of numbers,” rather than only systems that
 22 have the capacity to dial randomly or sequentially).

23 Mr. Hansen’s opinions in this case present the same impermissible
 24 hypothesizing that was excluded in *Yahoo*. Mr. Hansen admits that Ocwen’s
 25 Aspect system does not presently generate random or sequential numbers, nor does
 26

27 ⁶ While Plaintiff may attempt to rely on the decision in *Marks* in support of Mr. Hansen’s testimony and report, it
 28 should be noted that *Marks* “decline[d] to reach the question whether the device needs to have the current capacity to
 perform the required functions or just the potential capacity to do so.” *Marks v. Crunch San Diego, LLC*, No. 14-
 56834, 2018 U.S. App. LEXIS 26883, at *27 n.9 (9th Cir. Sep. 20, 2018).

1 Ocwen use the system in that way. Rather, Mr. Hansen claims that the system has
 2 the latent—not present—capacity to generate random or sequential numbers
 3 because code can be written into the system to allow it to do so. *See Hansen*
 4 Report, ¶ 34; Hansen Dep. Tr., 108:23-109:7. In fact, like in *Yahoo*, Mr. Hansen’s
 5 report provides the code that could be used. Mr. Hansen, however, does not (and
 6 cannot) claim that Ocwen ever wrote this code into its system or has any intention
 7 to do so. Indeed, Mr. Hansen testified that he “would be very surprised if [Ocwen]
 8 called random numbers or sequential numbers.” Hansen Dep. Tr., 141:4-5.⁷
 9 Notably, the *Keyes* court concluded that “to modify the Aspect System, Ocwen
 10 would need to alter the system’s source code, and [**Ocwen**] **does not have access to**
 11 **that code.**” *Keyes* at 19 (emphasis added).

12 The Ninth Circuit recently issued an opinion confirming that D.C. Circuit in
 13 ACA “concluded that the parties’ 2015 rulemaking petition to the FCC reopened
 14 consideration of the definition of ATDS established in the FCC’s 2003 order, as
 15 well as its subsequent rulings.” *Marks v. Crunch San Diego, LLC*, No. 14-56834,
 16 2018 U.S. App. LEXIS 26883, at *13-14 (9th Cir. Sep. 20, 2018). Judge Wright of
 17 this Court also recently confirmed that “the decision in *ACA International* reaches
 18 previous orders filed by the FCC, and not just the 2015 order immediately at issue.”
 19 *Washington v. Six Continents Hotels, Inc.*, No. 2:16-CV-03719-ODW-JEM, 2018
 20 U.S. Dist. LEXIS 145639, at *6 (C.D. Cal. Aug. 24, 2018). Preliminarily, Judge
 21 Wright averred that the Central District of California, like other district courts, is
 22 bound by ACA. *Id.* at *6 (holding that “the decision by the D.C. Circuit in this case
 23 has binding precedential effect nationwide.”). This ruling directly contradicts the
 24 decision in *McMillon v. Rash Curtis & Assocs.*, 2018 U.S. Dist. LEXIS 101700, at
 25 *7-8 (N.D. Cal. June 18, 2018) and other Hobbs Act arguments relied upon by
 26 Plaintiff. *See also Marks*, 2018 U.S. App. LEXIS 26883, at *19 (“Because the D.C.
 27

28 ⁷ Given that Ocwen is trying to contact its existing customers, it makes absolutely no sense for Ocwen to alter
 Aspect’s source code (even assuming it could) to allow it to generate random or sequential numbers, store, and dial
 them.

1 Circuit exercised its authority to set aside the FCC's interpretations of the definition
 2 of an ATDS in the 2015 order... and any prior FCC rules that were reinstated by
 3 the 2015 order..., we conclude that the FCC's prior orders on that issue are no
 4 longer binding on us."). Moreover, Judge Wright further concluded that:

5 By its plain language, the court in *ACA* did not set aside the 2015
 6 ruling, but rather "the Commission's treatment of [which functions
 7 qualify a device as an autodialer]." *ACA Int'l*, 885 F.3d. at 703.
***Indeed, the FCC's declaration from the 2003 ruling (and affirmed
 8 in the 2008 and 2015 rulings), that a predictive dialer is an ATDS is
 9 what the D.C. Circuit found inconsistent with the FCC's other
 10 definitions of an ATDS.*** Eliminating the 2015 ruling would do
 11 nothing to remedy the lack of clarity the D.C. Circuit found at issue.
 12 As the court in *ACA* did not set aside a ruling, but rather the FCC's
 13 treatment of the definition of an autodialer, this treatment was set
 14 aside from all previous FCC rulings. *See id.* In short, beginning with
 15 its 2003 ruling that a predictive dialer qualified as an autodialer, the
 16 FCC has espoused competing definitions of the qualities an autodialer
 17 must possess. ***It was the clear intention of the D.C. Circuit to set
 18 aside all such competing definitions until the FCC chooses to clearly
 19 establish that the "must be able to generate and dial random or
 20 sequential numbers" standard is no longer a requirement for a
 21 device to be considered an ATDS.***

22 In conclusion, the Court finds that the D.C. Circuit's decision reached
 23 all of the aspects of FCC rulings which allowed for "potential
 24 capacity" to generate random or sequential numbers ***and which
 25 established a predictive dialer as an ATDS.***

26 *Id.* at *8-9 (emphasis added) (expressly disagreeing with plaintiff's reliance on
 27 *Reyes v. BCA Financial Services, Inc.*, 2018 U.S. Dist. LEXIS 80690 (S.D. Fla.
 28 May 14, 2018)). Ultimately, the decision in *Washington* confirms that Hansen's
 29 reliance on the FCC's guidance that a predictive dialer is an ATDS—even though it
 30 cannot generate random or sequential numbers—is simply wrong following *ACA*.

31 After *ACA*, a plaintiff must show that the telephone system has the present
 32 capacity—not some potential or latent capacity—to generate random or sequential
 33 numbers. Mr. Hansen's opinions do not bear on that determinative question.

1 Rather, as found by the Third Circuit, Mr. Hansen's opinions deal with the very
 2 latent capacity issues that the D.C. Circuit specifically rejected in ACA.
 3 Accordingly, the opinions are irrelevant and thus inadmissible.

4 **2. Mr. Hansen's Legal Conclusions Should Be Excluded.**

5 Even if Mr. Hansen's opinions were relevant to the issues in this case, they
 6 still constitute inadmissible legal conclusions.

7 A threshold element of Plaintiff's TCPA claim is that Ocwen called
 8 Plaintiff's cellular telephone using an ATDS. The TCPA defines an ATDS as
 9 "equipment which has the capacity (A) to store or produce telephone numbers to be
 10 called, using a random or sequential number generator; and (B) to dial such
 11 numbers." 47 U.S.C. § 227(a)(1). In his report, Hansen makes numerous legal
 12 conclusions that Ocwen's system is an ATDS, including:

- 13 • "[T]he dialer has the characteristics of an ATDS, as it relates to
 predictive dialers, as clarified in the FCC 2003 Order";
- 14 • "[I]n my expert opinion, the below dialing system that is discussed
 in detail has the characteristics of an 'automated telephone dialing
 system' ("ATDS") as defined by the TCPA";
- 15 • "[I]n my expert opinion, the dialing system . . . has the
 characteristics of an ATDS as contemplated by the TCPA and
 clarified by the FCC"; and
- 16 • [T]he calls placed by Ocwen to Plaintiff using the dialer described
 in detail above were made using a predictive dialer that has the
 characteristics of an automatic telephone dialing systems [sic] as
 defined by the TCPA and FCC.

21 See Hansen Report, ¶¶ 20, 22, 25, 38. Indeed, in his deposition, Mr. Hansen
 22 explained that "predictive dialers are a subset of ATDSs." Hansen Dep. Tr., 131:6-
 23 8.

24 These exact same legal conclusions—by Hansen and regarding Ocwen's
 25 Aspect system—were excluded in *Keyes* as "impermissibly constructed legal
 26 standards and made legal conclusions." *Keyes* at 13. Indeed, it is well settled that
 27 an expert may not offer legal conclusions. *Nationwide Transp. Fin. v. Cass Info.*
 28 *Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) ("an expert witness cannot give an

1 opinion as to her legal conclusion, *i.e.*, an opinion on an ultimate issue of law”).
 2 This is because “instructing the jury as to the applicable law is the distinct and
 3 exclusive province of the court.” *Id.* Accordingly, “expert testimony that consists
 4 of legal conclusions is unhelpful and inadmissible.” *Arjangrad v. JPMorgan Chase*
 5 *Bank, N.A.*, No. 10-CV-01157, 2012 WL 1890372, at *7 (D. Or. May 23, 2012)
 6 (citing *United States v. Boulware*, 558 F.3d 971, 975 (9th Cir. 2009)). In this case,
 7 Mr. Hansen’s assertions that the Aspect system is a predictive dialer is exactly the
 8 type of legal conclusion Rule 702 seeks to limit as explained by *Keyes*.

9 Courts regularly hold that experts, including Mr. Hansen, may not offer an
 10 opinion that a telephone dialing system is an ATDS—exactly what Hansen is
 11 attempting to do here. In *Keyes*, the plaintiff, represented by the same counsel as
 12 Plaintiff in this case, proffered Mr. Hansen as an expert regarding the very same
 13 Aspect system at issue in this case. Mr. Hansen’s report in *Keyes* and his report in
 14 this case are *identical* save the respective plaintiffs’ names and bates labels. *Keyes*
 15 held that

16 Hansen has not only defined the governing legal standard by
 17 providing an extensive history and explanation of what constitutes an
 18 ATDS under the TCPA and the Commission’s guidance, but he has
 19 also impermissibly applied that standard to the facts of this case by
 concluding that Ocwen’s Aspect System is an “ATDS as
 contemplated by the TCPA and clarified by the FCC[.]”

20 *Id.* at 12-13. Because Hansen seeks to offer the very same opinions in this case,
 21 there can be no doubt that he “impermissibly applied that [legal] standard to the
 22 facts of this case by concluding that Ocwen’s Aspect System is an ATDS.” *Id.*
 23 (internal quotations omitted).⁸

24 In *Strauss v. CBE Grp., Inc.*, 2016 U.S. Dist. LEXIS 65587 (S.D. Fla. March
 25 2016), plaintiff also retained Mr. Hansen as an expert witness, who provided a

26 ⁸ The *Keyes* court also concluded that Mr. Hansen’s report “lack[ed] a proper factual basis because he has merely
 27 reviewed manuals and run tests on his computer, and he has not inspected the actual Aspect System which Ocwen
 28 uses to make calls.” *Keyes* at 8. “As a result,” the court concluded “Hansen’s report is ‘unsupported speculation’
 and a ‘mere guess’ regarding how Ocwen uses the Aspect System.” *Id.* at 11. As Mr. Hansen’s report and testimony
 in this case is based on an identical premise, the same result is warranted here.

written report opining that the defendant used an ATDS and that the equipment used to call the plaintiff satisfied the statutory definition of an ATDS. In virtually identical fashion to the report submitted in the instant case, Hansen's report in *Strauss* stated, among other things:

- [I]n my expert opinion, [the Noble Systems Predictive Dialer] satisfies the requirements of an "automatic telephone dialing system" ("ATDS") as defined by the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. ("TCPA");
- I am of the opinion that Defendant used an Automatic Telephone Dialing System to place telephone calls to Plaintiff, or more specifically, that the characteristics of the telephone dialing system described above meet the definition of equipment that has the capacity to store or produce numbers to be called, using a random or sequential number generator, and the capacity to call such numbers;
- [I]n my expert opinion, the dialing system (as outlined above) constitute an ATDS as contemplated by the TCPA and clarified by the FCC; and
- [I]t is also my expert opinion that all of the calls, at issue, made to Plaintiff in this case were made using an automatic telephone dialing system.

Strauss, 2016 WL 2641965, at *2. The court concluded that these statements constituted improper legal conclusions. *Id.* Reasoning that "Hansen may not offer a conclusion as to the legal definition of an ATDS, or the legal implications of using a predictive dialer," the court excluded those portions of Hansen's report "stating that the [defendant] used an ATDS and that the equipment used to call the Plaintiff fits within the statutory definition of an ATDS." *Id.*

In *Legg v. Voice Media Group, Inc.*, 2014 U.S. Dist. LEXIS 61322 (S.D. Fla. May 2, 2014), another purported TCPA expert sought to opine that the systems that the defendant used "satisfy the TCPA's definition of an automatic telephone dialing system." *Id.* at *12. The court explained that "[i]mplicit within this testimony is Snyder's conclusion as to the legal definition of an automatic telephone dialing system. An expert witness, however, may not offer legal conclusions; only the Court may instruct the jury as to the state of the law." *Id.* at *11-12. As a result,

1 the court excluded the expert's opinion because he "may not offer a conclusion as
 2 to the legal definition of an automatic telephone dialing system, or the legal
 3 implications of VMG's systems in relation to that definition." *Id.* at *12.

4 In the instant case, Mr. Hansen offers essentially the same legal conclusions
 5 that were excluded in *Keyes*, *Strauss*, and *Legg*. He is offering legal conclusions,
 6 both as to his assertion that the Aspect system is an ATDS and his assertion that it
 7 has the characteristics of an ATDS. For the same reasons, this Court should
 8 exclude Hansen's opinions that the Aspect system constitutes a predictive dialer,
 9 that the Aspect system is an ATDS or a system that has the characteristics of an
 10 ATDS, and/or any opinions concerning the legal implications of using a predication
 11 dialer.

12 **B. Terms of Order Sought**

13 Ocwen will move the Court to exclude the testimony and opinions of Jeffrey
 14 A. Hansen from trial.

15 **II. CONCLUSION**

16 Given the foregoing, any and all evidence, argument, and testimony offered
 17 by Plaintiff's expert Jeffrey A. Hansen must be excluded at trial.

18 Dated: October 1, 2018

TROUTMAN SANDERS LLP

21 By: /s/ John C. Lynch

22 John C. Lynch

23 Jessica R. Lohr

24 Virginia B. Flynn

25 *Attorneys for Defendant*

CERTIFICATE OF CM/ECF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on October 1, 2018, to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system. Any counsel of record who have not consented to electronic service through the Court's CM/ECF system will be served by electronic mail, first class mail, facsimile and/or overnight delivery.

/s/ John C. Lynch
John C. Lynch